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JAMES H. McKENN

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

162

MRS. BEULAH SCHWEER AND
J. C. NORMAN, ... *Appellants,*

v.

J. C. BROWN, Trustee for G. H. Schweer,
Bankrupt, ... *Appellee.*

R. E. WILEY,

GEO. B. PUGH,

Attorneys for Appellee on These Motions.

WILSON PRINTING CO. LITTLE ROCK, ARK.

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J. C. BROWN, Trustee for G. H. Schweer,
Bankrupt, ...*Appellee.*

MOTION TO DISMISS OR AFFIRM.

Comes the appellee, J. C. Brown, Trustee for the Estate of G. H. Schweer, bankrupt, and moves the court to dismiss the appeal herein because:

1. The question of jurisdiction alone is not herein certified to this court from the court below for decision.

2. There is no certificate from the court below that the question of jurisdiction was in issue in this case.

3. The court below took jurisdiction of the case and decided it upon its merits, and it does not appear that the question of jurisdiction alone is sent up to this court on this appeal for decision.

4. It does not appear, in the record, or otherwise,

what particular question, if any, of jurisdiction was in issue in the court below, nor what particular question, if any, of jurisdiction was decided by the court below, nor what particular question, if any, of jurisdiction, is sent up to this court on this appeal for its decision.

5. On the record herein this court has no jurisdiction or authority to entertain this appeal.

But if it be considered that the record in this cause shows that this court has jurisdiction to entertain this appeal, the appellee also moves the court to affirm the judgment or decree from which the said appeal purports to have been taken, because it is manifest from said record that the said appeal was taken for delay only.

J. C. BROWN,

Trustee of Estate of G. H. Schweer, Bankrupt, Appellee.

R. E. WILEY,

GEO. B. PUGH,

Counsel for Appellee on these motions.

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BRIEF FOR APPELLEE ON HIS MOTION TO DISMISS OR AFFIRM.

This is an appeal from a District Court of the United States, sitting in bankruptcy, direct to the Supreme Court.

There is no provision in the Bankrupt Act for such appeals, other than pretermitting them to regulation by United States laws governing appeals in other cases.

Bankrupt Act 1898, Secs. 24, 25.

Denver Bank *v.* Klug, 186 U. S., 202.

Jurisdiction of this appeal depends therefore on Section 5 of the Act of March 3, 1891, establishing the Circuit Court of Appeals.

Id.

There is no pretense that this case falls within any of the classes of cases named in that section except the first, wherein appeals are allowed: "in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

Unless this appeal comes within that provision it cannot be entertained. In this case appellants have not caused the "question of jurisdiction alone" to be "certified to the Supreme Court from the court below for decision." There is an omission of any certificate from the court below of the question of jurisdiction or of any other question. There is no certificate of any kind from the court below in the record.

In a line of decisions beginning shortly after the passage of the Act and extending to recent date this court has held the certificate called for by the statute to be "An absolute prerequisite" to the exercise of appellate jurisdiction under the statute, and the absence of such certificate fatal to the appeal.

Maynard *v.* Hecht, 151 U. S., 324, 328.

Moran *v.* Hagerman, Id., 329, 333.

Colvin *v.* Jacksonville, 157 U. S., 368, and 58 U. S., 456.

Davis & Rankin *v.* Barber, 157 U. S., 673.

Ansbro *v.* United States, 159 U. S., 695, 697.

The Bayonne, 159 U. S., 687.

Van Wagenen *v.* Sewall, 160 U. S., 369.

Chappell *v.* United States, 160 U. S., 499, 507.

Davis *v.* Geissler, 162 U. S., 290.

Merritt *v.* Bowdoin College, 167 U. S., 745.

Consolidated Water Co. *v.* Babcock, 173 U. S., 702.

Denver Bank *v.* Klug, 186 U. S., 202, 204.

In the early part of the period three or four cases came up where this court took jurisdiction of the appeal without a formal certificate, on the grounds that the pleadings, the prayer for appeal and the order allowing it, and the judgment and opinion of the court furnished a sufficient equivalent to the certificate by setting forth distinctly and unequivocally that (1) the jurisdiction of the court below was in issue; (2), that it was decided against appellant; (3), that the question of the jurisdiction alone was sent up to this court for decision, and (4), the precise nature of the question of jurisdiction which was sent up.

Lehigh Mining and Mfg. Co., 156 U. S., 322.

Shields *v.* Coleman, 157 U. S., 168.

Interior Construction Co. *v.* Gibney, 160 U. S., 217.

Smith *v.* McKay, 161 U. S., 355.

These cases are exceptional, however, and the court in later opinions has explained and limited them and indicated its intention not to enlarge their application, nor to make them authorities to sustain appeals

in the absence of formal certificates, unless the record otherwise supplies clearly and distinctly every requirement which it is the office of the statutory certificate to furnish.

Van Wagenen *v.* Sewall, 160 U. S., 369.

Chappell *v.* United States, 160 U. S., 499, 507.

Filhoil *v.* Torney, 194 U. S., 356.

Louisville Trust Co. *v.* Knott, 191 U. S., 225.

In the few cases in which the appeals are entertained without the statutory certificate, it is made clearly to appear that every essential to the appeal is otherwise supplied.

In re Lehigh Manufacturing Co., 156 U. S., 322, to give the U. S. Court jurisdiction, the plaintiff in ejectment alleged diversity of citizenship; the defendant distinctly answered in his pleas that plaintiff had been fraudulently and collusively organized as a corporation of Pennsylvania for the sole purpose of the conveyance to it by a West Virginia corporation of the land in controversy in order thus to create a diversity of citizenship, the defendant and the original claimant having been citizens of West Virginia. This raised a definite issue of jurisdiction, whose particular char-

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acter was apparent. The judgment of the court was that the pleas to the jurisdiction be sustained (after reciting them), that the court has no jurisdiction of the case and it is therefore dismissed. The petition

for writ of error recited the dismissal for want of jurisdiction and prayed a writ of error upon the said question of jurisdiction, and the writ was "allowed as prayed for." This court in its opnion re-affirmed the rule in Maynard *v.* Hecht, but held the question of jurisdiction to be sufficiently certified, because that was the sole question in the record, the cause having been dismissed for want of jurisdiction, and the particular question of jurisdiction decided was distinctly and definitely stated in the pleas.

The distinction is made in this case (p. 327) between cases where the sole question decided was one of the jurisdiction as where the case is dismissed for want of jurisdiction, and cases where other questions than the jurisdiction are decided, as where the court decides the question of jurisdiction affirmatively and then disposes of the merits of the case with all the issues therein involved; and it is intimated that in the latter class of cases, the certificate is absolutely essential and will not be dispensed with. The opinion cites United States *v.* Jahn, 155 U. S., 109, 112, to this effect.

In the case at bar the jurisdiction was upheld and the court went on and decided the merits of the whole case, involving issues of fact and propositions of law. A certificate of the jurisdiction alone is therefore essential under the authority of the foregoing case.

It also appears in the Lehigh Manufacturing Co. case that the precise question of jurisdiction decided

and appealed is fully and clearly stated in the pleadings. No such showing is made anywhere in the record at bar.

In the case of Shields *v.* Coleman, 157 U. S., 168, there was no formal certificate, but the petition for appeal sets out distinctly and fully the precise question of jurisdiction decided against appellant and prays an appeal from the decree taking and exercising jurisdiction; and the court's order allowing the appeal states "this appeal is granted solely upon the question of jurisdiction," and makes provision for the transmission to the appellate court of such portions only of the record as pertains to the question of jurisdiction.

Here again, without the formal certificate, everything which the certificate is made for is otherwise supplied. In the words of Mr. Justice Brewer in his opinion in the case "there is (1) a plain declaration that the single matter which is by the record sent up to this court for decision is a question of jurisdiction, and (2) the precise question is clearly, fully, and separately stated." p. 177.

Neither of these things appear in the case at bar, and the foregoing case is therefore no authority for sustaining this appeal.

Interior Construction Co. *v.* Gibney, 160 U. S., 217, is another case where the appeal was entertained without a formal certificate, but like Lehigh Mining & Mf'g. Co. *supra*, it is easily distinguished from the case at bar by having no question in it except that of

the jurisdiction of the court. The complaint alleged diversity of citizenship as the ground of jurisdiction; defense filed plea in abatement that defendants were not all residents of the same district; and that court was therefore without jurisdiction; plaintiff demurred to the plea, and the court sustained the demurrer and dismissed the action for want of jurisdiction. Appeal was prayed, asking review of the judgment that court had no jurisdiction. Clearly here the question of jurisdiction was the sole question decided, and this question alone is submitted on appeal, and also the "precise question is clearly, fully and separately stated," in the plea to the jurisdiction. This case is no authority for sustaining the appeal at bar, since in the latter the court below took jurisdiction and decided many questions besides that of jurisdiction, and nowhere does it appear in the record at bar that a single, definite question of jurisdiction is sent up for this court's decision; a *fortiori* is there no "precise question" of jurisdiction, "clearly, fully and separately stated."

Smith *v.* McKay, 161 U. S., 355, is the only further case where the court has held the absence of the formal statutory certificate to be supplied by the appearance of the requisite facts otherwise in the record. There the defendant filed its special motion to dismiss the bill because plaintiff had a plain, adequate and complete remedy at law. Motion was denied and after decree for plaintiff defendant appealed upon the ex-

press ground that the court erred in taking jurisdiction of the bill, and in his appeal prayed that "the question of jurisdiction be certified to the Supreme Court." The said appeal was allowed, and the certificate states that so much of the record as pertains to the court's jurisdiction is sent up. Here the "precise" question of jurisdiction is "clearly, fully and separately stated" in the defendant's motion to dismiss the bill, and the prayer for appeal, the allowance of same, the opinion of the court, and the certificate to the record clearly indicated the question of jurisdiction alone is sent up. The distinction between this and the case at bar is apparent from our remarks distinguishing the previous cases; the case at bar being particularly lacking in any "full, clear, and separate statement" of the "precise question of jurisdiction" in issue. Besides which the appeal in Smith *v.* McKay was dismissed on other grounds and the case thus loses much force as an authority for entertaining appeals.

These cases can hardly be called exceptions to the rule requiring the statutory certificate as a pre-requisite to ascertaining the appeal, which is held in Maynard *v.* Hecht and the line of decisions following it, because they all endorse and enforce the reason for the rule. But such slight modification of the application of the rule as is made in them is further limited and explained by later cases.

In Van Wagenen *v.* Sewal, 160 U. S., 369, plaintiff's

bill in equity was demurred to by defendant because a previous final decree had exhausted the court's jurisdiction over the case, and second, the court had no power or jurisdiction to grant the petitioners relief. The court dismissed the bill. Plaintiff appealed and in absence of a certificate sought to sustain the appeal on authority of Lehigh Mining & Mf'g. Co., and Shields *v.* Coleman, *supra.* But this court distinguished them and enforced the rule of Maynard *v.* Hecht, holding that there was no "precise question of jurisdiction, fully, clearly and separately stated." Mr. Justice Brown, in his opinion, says, "We cannot be required to search the record to ascertain whether the petition was dismissed for the want of equity, or for some other reason. Indeed, it appears to have been the very object of the fifth section of the Act of 1891, to have the question of jurisdiction plainly and distinctly certified to us, or at least to have it appear so clearly in the decree of the court below that no other question was involved, that no further examination of the record would be necessary." p. 373.

In Chappel *v.* United States, 160 U. S., 499, the cases of Shields *v.* Coleman, Lehigh Mining & Mf'g. Co. and Interior Construction Co. *v.* Gibney, *supra*, are again cited to sustain an appeal in the absence of a certificate, but this court again enforces the rule of Maynard *v.* Hecht. Mr. Justice Gray in his opinion in distinguishing and explaining the case aforesaid,

states the essential requisite to the appellate jurisdiction by quoting from Shields *v.* Coleman as follows: (p. 508). "It is not necessary that the word 'certify' be formally used. It is sufficient if there is a plain declaration that the single matter which is by the record sent up to this court for decision is a question of jurisdiction, and the precise question clearly, fully and separately stated. No mere suggestion that the jurisdiction of the court was in issue will answer. This court will not of itself search, nor follow counsel in their search of the record, to ascertain whether the judgment of the trial court did or did not turn on some question of jurisdiction. But the record must affirmatively show that the trial court sends up for consideration a single definite question of jurisdiction."

No subsequent case appears where an appeal was entertained in the absence of a certificate on authority of the foregoing cases, but there are several since then dismissing appeals for want of certificates.

Davis *v.* Geissler, 162 U. S., 290.

Merritt *v.* Bowdoin College, 167 U. S., 745.

Consolidated Water Co. *v.* Babcock, 173 U. S., 702.

Denver Bank *v.* Klug, 186 U. S., 202, 204.

The latest case involving the question is Filhiol *v.* Torney, 194 U. S., 356.

In it after consideration of all the adjudged cases on the subject, which are collated and cited in the opin-

ion, the court lays down the fully considered and approved test of what only will be held by this court as a sufficient equivalent to the formal certificate where the latter is wanting. From all the cases on the subject Mr. Justice Brewer in the opinion in the case selects and approves Chappell *v.* United States, 160 U. S., 499, as best stating the rule, and quotes largely from the opinion therein which in turn had quoted from and adopted that part of the opinion in Shields *v.* Coleman, *supra*, which lays down the essential requisite of the appellate jurisdiction, and which carefully explains the *sine qua non* of the equivalent of a formal certificate. These three cases, therefore, the first entertaining the appeal and the latter two denying it, together constitute the law of the case at bar.

Quoting from Mr. Justice Brewer's opinion in Shields *v.* Coleman, *supra* (p. 177), (1) "a plain declaration that the single matter which is by the record sent up to this court for decision is a question of jurisdiction and (2) the precise question clearly, fully, and separately stated," are essential requisites *sine qua non* of a sufficient equivalent of a formal certificate. This and more language from this opinion is quoted in the Chappell case by Mr. Justice Gray, who applies the test to the facts of that case, and holds (p. 509) "Here, certainly, is no such clear, full and separate statement of a definite question of jurisdiction, as will

supply the want of a formal certificate under the first clause of the statute."

In the case of Huntington *v.* Laidley, 176 U. S., 668, Mr. Justice Gray delivering the court's opinion concisely states both essentials together thus (p. 676), "the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction."

The case at bar does not answer this test.

There is not anywhere in the record a plain declaration that the single matter which is by the record sent up to this court for decision is a question of jurisdiction. The court below took jurisdiction and decided many questions of law and fact on the merits of the case, and entered a decree for plaintiff as prayed for, and the prayer for appeal is general, from the judgment of the court.

The petition for appeal (R. 54) recites that defendant is aggrieved by the order and decree "wherein it was ordered that defendants pay over to J. C. Brown, trustee, $2.000," and then prays "plaintiffs do hereby appeal from said order and decree to the Supreme court." The allowance is general by an order endorsed on the petition as follows: "Appeal allowed and returnable within 30 days."

Says the court in Chappell's case, 160 U. S., 507:

"If both a question of jurisdiction and other questions were before the court below, and a writ of error

is allowed in the usual and general form to review it. judgment without certifying or specifying the question of jurisdiction, this court cannot take jurisdiction."

This fits the case at bar exactly. It is no answer to say that the assignment of errors, which is referred to in the petition for appeal as the reason for the appeal, assigns only the taking of jurisdiction by the court, as error, because it is conceivable the defendants could not conscientiously complain that the court erred in giving judgment for plaintiff on the merits. The assignment of errors cannot limit the appeal to any particular separate step or action of the court in the cause. Its office is merely to assign the reasons for the appeal; to point out the errors because of which the judgment or other particular step in the cause appealed from is asked to be reversed; and it is the office of the prayer for, and the order allowing, the appeal to designate what action of the court is appealed from. Here the defendants answered to the merits, introduced testimony in support of their answer, and after hearing at which they were heard by counsel, and a decree against them, they pray an appeal generally from the judgment of the court against them on the merits. This is far short of the "plain declaration that the sole question sent up to this court for its decision is a question of jurisdiction," necessary to the entertaining of this appeal.

But the court considers that there is a sufficient

showing in the record that the question of jurisdiction alone is here sent up for decision, the appeal must still be dismissed for failure to show what the question of jurisdiction is. The latter is perhaps the most important office of the statutory certificate, as recognized by all the cases because it operates as a time saver to this court, thus enforcing the policy of the statute to relieve and prevent congestion of the docket. No case will be found where this requirement is dispensed with. We have already herein commented on all the cases dispensing with the formal certificate and have shown that in them all the particular question of jurisdiction is clearly and fully shown, and that, too, by the record proper—the pleadings, judgment and appeal papers. No search of the testimony was required in any of them to find the question.

There is no statement whatever in this record, in the pleadings, in the testimony, or elsewhere, clear, separate, or otherwise, of the precise question of jurisdiction, if any, in issue in the court below, *a fortiori*, none of the question, if any, sent here on appeal.

The pleadings of the defendants to the petitions do not intimate any grounds for lack of jurisdiction by the court. The response of defendant Norman (R. 4), after answering fully to the merits has the following only as to the jurisdiction:

"Defendant J. C. Norman, further answering, says this court is without jurisdiction to hear and determine

this case and prays that the same may be dismissed."

The response of defendant, Beulah Schweer, also responds fully to the merits, but has as to the jurisdiction the following only:

"Second. She denies that this court has jurisdiction to hear or determine this cause." (R. 4.)

Other than these statements no mention whatever is made in the pleadings of the jurisdiction of the court.

The referee in bankruptcy before whom the proceedings originated, after a full hearing made orders against defendants as prayed by the petitions (R. 8, 9), and no reference was made in them as to the jurisdiction of the court. At defendants' request the referee made his findings of fact and law, and certified the questions, with all the testimony, to the judge of the District Court (R. 5-7), but not a word is said therein about the jurisdiction of the court.

The District Judge heard the matter *de novo* and made an order therein as prayed by plaintiffs, and the jurisdiction of the court is not mentioned in them (R. 53-54). He also hands down a memorandum of opinion in the case (R. 51-53), but no question of the jurisdiction is therein referred to. Neither the prayer for appeal, the order allowing it, nor the assignment of errors show any particular question of jurisdiction.

The prayer for appeal mentions it not otherwise than by asking "that a transcript of the records, papers,

and proceedings pertaining to the jurisdiction of this honorable court upon which said order and decree was made, duly authorized may be certified," and by referring to the assignment of errors as the reasons for the appeal prayed. (R. 54.) The assignment of errors, two only in number, simply assign that the court (1) "erred in holding that it had jurisdiction to try this cause," and (2) in "not sustaining the defendants' demurrer to the jurisdiction" (R. 55), without in any way intimating what grounds for lack of jurisdiction existed.

Of course the testimony makes no mention of the jurisdiction of the court.

Thus it is seen there is in the record not the slightest showing of what question or questions of jurisdiction, if any, were decided by the court below, or sent to this court by the appeal for decision; much less is there such a showing of the precise question as is required by the test approved by this court in all the cases, and especially in Shields *v.* Coleman, Chappell *v.* U. S. and Filhiol *v.* Torney, *supra.* The language quoted in the last case from the opinion in the Chappell case is applicable to the case at bar.

"Here, certainly, is no such clear, full, and separate statement of a definite question of jurisdiction as will supply the want of a formal certificate under the first clause of the statute."

Chappell *v.* U. S., 160 U. S., 509.

In the Chappell case the defendant demurred to the jurisdiction and set up specifically several grounds for lack of jurisdiction, namely, that the proceedings should have been had in a court of the State of Maryland, and that Congress had not authorized the United States to bring the suit, and that the statute under which the proceedings were had was unconstitutional. And the prayer for the writ of error asks the writ "in order that said rulings, judgment, etc., may be reviewed by the Supreme Court upon the question of jurisdiction raised in the demurrer." How far stronger is this showing of a definite question of jurisdiction than that of the record in the case at bar. Yet this court held it was insufficient because it does not "define or indicate any specific question of jurisdiction" (p. 508), and dismissed the appeal.

The latest case, Filhiol *v.* Torney, is still stronger. In it, the sole question decided was one of jurisdiction, the complaint being dismissed for want of jurisdiction.

There was a demurrer by defendant to the jurisdiction setting up specifically first, a want of jurisdiction over the present defendant; second, a like want of jurisdiction over the subject matter of the action. The opinion of the court below was confined solely to a discussion of the question of jurisdiction over the subject matter. Notwithstanding this showing the court held there was "not anything which can be considered an equivalent to the formal certificate," and

dismissed the appeal. This decision indicates the court's intention not to go further in the direction of dispensing with the statutory certificate. It is especially indicative of the importance attached to the second requirement of the rule, namely, that the "precise question of jurisdiction must be fully, clearly and separately stated," for it was for want of that showing alone that the appeal was dismissed, there being no sort of uncertainty that the sole question decided and appealed was one of jurisdiction. This makes it a strong authority for dismissing this appeal, for the record showing in the case at bar of a specific question of jurisdiction falls very far short of the showing in the Filhiol case. In fact, as said before, there is an entire want of any such showing in the case at bar.

The policy of the Act of March 3, 1891, to limit and restrict the bringing of cases to this court on appeal and thus to relieve and prevent a crowded docket is well recognized, and has been repeatedly endorsed by this court. The provisions of this fifth section are directly pursuant to that policy, and there being no attempt in the present case to comply with them, this policy as well as the letter of the statute requires the dismissal of this appeal.

Nor will any hardship result to defendants by the enforcement of this statute and the dismissal of the appeal, for they have fully presented to two tribunals their defense—the only defense they could urge in any

court—and have had two separate hearings on its merits.

The case originated before a referee in bankruptcy who gave defendants full opportunity to get testimony and witnesses, and to present their defense; and they did introduce witnesses and testimony; the referee heard all the testimony offered, and after a hearing he made a careful finding of fact that this bankrupt's wife, and his attorney held $2,000, as his agent or trustee, of money belonging to the bankrupt's estate, and made an order directing them to turn it over to the trustee. Afterwards the District Judge again entered fully into all the testimony on a hearing and as said in his opinion: "In view of the earnestness with which counsel have attacked the findings of fact, as well as conclusions of law, of the referee, I have carefully gone over the testimony and considered the case as if it was tried *de novo* before me without giving that weight to the findings of the referee, that under the law, they are entitled to." (R. 51, 52.)

And he fully sustained the facts found by the referee and made the same order. The merits of the defendant's defense have thus been carefully heard, and acted upon by two practically different courts with the same result, and no injustice can come to defendants by the dismissal of the appeal.

Having had their day in court on the merits, defendants in urging that the court before which they

were heard had no jurisdiction, but that some other court had jurisdiction, are making a technical and dilatory resistance, and it is their duty to bring themselves clearly within the provisions of the statute which they invoke to authorize their appeal, and it being apparent they have not done this, their appeal should be dismissed.

II.

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED.

If the court should not sustain our motion to dismiss the appeal, there is still on this record sufficient color for the motion to dismiss to warrant the court in entertaining the motion to affirm.

Whitney *v.* Cook, 99 U. S., 607.

The Alaska, 130 U. S., 201, 208.

Hinckley *v.* Morton, 103 U. S., 764, 765.

The single question presented by this record is: Has the court of bankruptcy, by summary proceedings, the power to compel one to deliver to the bankrupt's trustee in bankruptcy money held without any *bona fide* claim of adverse right, but merely as agent for the bankrupt?

This question has been settled in the affirmative by this court in Mueller *v.* Nugent, 184 U. S., 1; Bryan *v.* Bernheimer, 181 U. S., 188, and Jaquith *v.* Rowley, 188 U. S., 620.

The District Court, following these cases, decided it so in the case at bar and the judgment should therefore be affirmed.

The appellants have caused all the evidence in this case to be transmitted here as part of the record, doubtless intending to ask this court to re-examine it in order to discredit or reverse the finding of facts by the lower court. But this court will look only to the finding of facts by the lower court, in considering the questions of law to be determined. It has so provided in its rules.

General Orders in Bankruptcy XXXVI, paragraph 3, provides: "In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States * * * the record transmitted on such appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

Few cases so far have come to this court by appeal under the bankruptcy act, but in such as have come this rule has been followed, and approved.

Bardes *v.* Hawarden Bank, 178 U. S., 524.

Pirie *v.* Chicago Title & Trust Co., 182 U. S., 438.

Jacquith *v.* Alden, 189 U. S., 78, 81.

N. Y. County Bank *v.* Massey, 192 U. S., 138.

Appeals, like this at bar, upon certificate are held to be governed by the same rules which govern

the certification of questions or propositions of law from the Courts of Appeals under the Act af March 3, 1891.

Bankruptcy Act, 1898, Sec. 25, d.
Collier on Bankruptcy (4th Ed.), p. 270.
Bardes *v.* Bank, 175 U. S., 526.
Denver Bank *v.* King, 186 U. S., 202, 205.
Maynard *v.* Hecht, 151 U. S., 324, 327.

Such certificates are heard not upon the whole case as shown by the evidence, but upon the finding of facts by the lower court, and are confined to that finding.

Warner *v.* New Orleans, 167 U. S., 467, 474-5.
Wall *v.* Cox, 181 U. S., 247.
Cross *v.* Evans, 167 U. S., 60.

A rule of the Supreme Court similar to General Order XXXVI, in banruptcy, provides what shall constitute the record in appeals from the Court of Claims.

Rule 1, of Order in Reference to Appeals from Court of Claims, Desty's Fed. Procedure (9th Ed.), p. 1543.

This rule was before the court for consideration shortly after its promulgation in the case of De Groot *v.* United States, 5 Wall., 419, and it was held that it would be strictly enforced, and that the finding of facts sent up by the lower court was conclusive on this court on the appeal and that the evidence should not be sent up. The court in its opinion says (p. 427): "We take

this occasion to say that we shall adhere strictly to the rules we have prescribed, and shall regard no other matter found in the transcripts sent to us than what they allow."

And this ruling has been adhered to since then.

U. S. *v.* Smith, 94 U. S., 214.

U. S. *v.* Pugh, 99 U. S., 265, 270.

U. S. *v.* Clark, 94 U. S., 73, 76.

There is also a similar rule governing contents of record in appeals in admiralty cases, based on an Act of Congress of February 16, 1875, " to facilitate disposition of cases in the Supreme Court."

Rules of Supreme Court, Rule 8, Cl. 6.

Under this rule it is held that the finding of facts by the court below is conclusive on appeal, and the evidence is not a part of the record.

The Annie Lindsey, 104 U. S., 185, 188.

The Abbotsford 98 U. S., 440.

The Benefactor, 102 U. S., 214.

The Adriatic, 103 U. S., 730.

Merchants Ins. Co. *v.* Allen, 121 U. S., 67, 72.

The S. C. Tyson, 105 U. S., 267, 270.

In the last named case a motion to dismiss was overruled, but the accompanying motion to affirm was sustained, the court saying (p. 270): "The only question presented arises on the finding of facts. From these it appears," etc., going on to hold that the appeal was taken for delay.

Similarly in cases tried without a jury under sections 649 and 700, Rev. Stat., the finding of facts by the Circuit Court is not reviewable in this court.

Tyng *v.* Grinnell, 92 U. S., 467, 471.

Ex parte French, 91 U. S., 423.

The E. A. Packer, 140 U. S., 360, 365.

The court doubtless promulgated clause 3 of General Order XXXVI in Bankruptcy, in the light of the foregoing rules and decisions, and will adhere to the practice indicated. Under the rule the evidence is not a part of the record, and even though it be transmitted, on appeal, with the transcript, will not be re-examined here, but the court will confine its consideration to questions arising on the facts as found by the lower court.

In the case at bar the District Judge handed down a memorandum of opinion (R. 51-53), in which he made a finding of facts concerning the case, considering the case, in the language of the court, " as if it was tried *de novo* before me, without giving that weight to the findings of the referee that, under the law, they are entitled to." (R. 52.)

These findings of fact by the judge are in substance:

That appellant, Beulah Schweer, the wife of the bankrupt, received from the bankrupt $2,000 in cash, belonging to him, shortly before the institution of the proceedings in bankruptcy, to hold same as the money of her husband, in order to enable him to defraud his

creditors and prevent his trustee in bankruptcy from receiving it.

That appellant, J. C. Norman, now has possession of the said $2,000 in cash, and makes no claim to it for himself, he having received it from Mrs. Schweer, to indemnify him against loss on his guarantee to one whom he had procured to become surety on a bail bond for the bankrupt's appearance to answer a criminal charge, and the said bond having been discharged without any liability being incurred.

That there was no adverse holding or claim to the money, by either of the appellants, and that Norman held the money as agent for the true owner, who was the appellee, as trustee of the bankrupt's estate, it having been the property of the bankrupt at the time he was adjudicated.

Upon these facts the court concluded that the trustee did not have to institute a plenary action against Norman, upon his refusal to turn over the money to the trustee, but the proceeding by petition and order to show cause before the referee was all that was necessary. (R. 53.) And an order was made requiring Norman to turn the money over to the trustee, sustaining a like order which had been made by the referee. (R. 53.)

As before stated this court has heretofore thoroughly examined the questions arising upon facts like the foregoing found by the court, in Mueller *v.* Nugent,

Bryan *v.* Bernheimer, and Jacquith *v.* Rowley, *supra*, and declared the law to be as found herein by the District Judge.

If by the approval by the District Judge in his opinion (R. 53), of the findings of facts by the referee, the latter be held to constitute part of the record, the result will be the same, for these findings are identical in effect with those in the opinion of the District Judge, that is to say, that Norman holds the $2,000 without making any claim to it, having received it for a temporay use in the bankrupt's behalf, from Mrs. Schweer, who had received it shortly before the bankruptcy proceedings, from her husband to whom it belonged, to hold for him for the purpose of secreting it from his trustee in bankruptcy. (R. 5-7).

It is apparent the appeal was taken for delay and the judgment should be affirmed.

R. E. WILEY,

GEO. B. PUGH,

Attorneys for Appellee on These Motions.

OPINION

Supreme Court of the United States.

No. 162.—October Term, 1904.

Mrs. Beulah Schweer and J. C. Norman, Appellants, vs. J. C. Brown, Trustee for G. H. Schweer, Bankrupt.	Appeal from the District Court of the United States for the Eastern District of Arkansas.

[November 7, 1904.]

The Chief Justice: This was a summary proceeding in the District Court of the United States for the Eastern District of Arkansas, in bankruptcy, requiring the payment to the trustee in bankruptcy of the sum of two thousand dollars as part of the assets of the bankrupt's estate. In return to a rule, one of the respondents alleged that he had paid the money over to the other and denied the jurisdiction of the court. The other, Mrs. Schweer, denied that she had or ever had had any money belonging or due to the estate, and denied jurisdiction. The matter was heard before a referee, who made findings of fact and conclusions of law, and ordered the return of the money. It was then carried to the District Court and there heard *de novo*. The District Court sustained the referee and entered decree for the payment of the money to the trustee. Thereupon an appeal was taken directly to this court on the ground that the case fell within the first of the classes of cases enumerated in section five of the judiciary act of March 3, 1891. But that class only includes cases where the question is as to the jurisdiction of courts of the United States as such, and the question has to be certified. That was not the question raised here, and none such was certified. And it is settled that the District Court had jurisdiction to determine whether any adverse claim to the money was asserted at the time the petition was filed. *Mueller* v. *Nugent*, 184 U. S. 1; *Louisville Trust Company* v. *Comingor*, Id. 18.

If the court erred in retaining jurisdiction on the merits, the remedy was by petition to the Circuit Court of Appeals under § 24*b* of the bankruptcy law. *Holden* v. *Stratton*, 191 U. S. 115.

Appeal dismissed.